

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 10, 2006 Session

**KAHN DOCKERY v. STATE OF TENNESSEE**

**Appeal from the Tennessee Claims Commission**  
**No. 20401799     Stephanie R. Reeves, Commissioner**

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**No. M2006-00014-COA-R3-CV - Filed on July 23, 2007**

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This appeal involves a claim for damages against the State of Tennessee filed by a former employee of the Tennessee Department of Children's Services who was fired for sexually abusing three minors. After the Tennessee Claims Commission dismissed the claim, the employee erroneously filed a notice of appeal with the appellate court clerk rather than with the clerk of the Claims Commission and did not cure this error within thirty days after the entry of the order being appealed. After this court dismissed the appeal for lack of jurisdiction, the employee filed a Tenn. R. Civ. P. 60.02(1) petition with the Claims Commission seeking re-entry of its order dismissing his claim. The Commission declined to grant the employee relief under Tenn. R. Civ. P. 60.02(1), and the employee appealed. We have determined that the employee has not demonstrated extraordinary circumstances warranting relief from the order dismissing his claim and, therefore, that the Claims Commission did not err by declining to grant him Tenn. R. Civ. P. 60.02(1) relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

James L. Harris, Nashville, Tennessee, for the appellant, Kahn Dockery.

Robert E. Cooper, Jr., Attorney General and Reporter, and Kenneth E. Douthat, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I.**

Kahn Dockery was employed by the Tennessee Department of Children's Services as a children's services officer. He worked at the Woodland Hills Youth Development Center ("Woodland Hills") in Nashville where he supervised both male and female adolescents. In February and March 2002, the Department received complaints that Mr. Dockery had sexually abused three adolescent females at Woodland Hills.

After an internal investigation substantiated the merits of the complaints, Mr. Dockery requested and received a hearing before one of the Department's administrative judges on July 18, 2002. Mr. Dockery and his lawyer were present at this hearing. On July 19, 2002, before the administrative judge could file her initial order, a grand jury in Davidson County indicted Mr. Dockery on six counts of sexual battery by an authority figure and four counts each of official oppression and official misconduct. On August 6, 2002, the Department hand-delivered a notice of termination to Mr. Dockery.

The Department's administrative proceedings were continued while the criminal charges against Mr. Dockery were pending. On November 3, 2003, the criminal charges against Mr. Dockery were dismissed. Over three months later, on February 10, 2004, the administrative judge filed an initial order concluding that Mr. Dockery had sexually abused the three girls. On February 26, 2004, the Commissioner of the Department of Children's Services filed a final order affirming the interim order. Mr. Dockery did not pursue either administrative or judicial review of the Commissioner's final order.

On May 24, 2004, Mr. Dockery filed a claim with the Division of Claims Administration asserting that the Department had "erroneously and negligently charged Claimant with committing child sexual abuse on two Caucasian female minors who were Woodland Hills residents." He also asserted that these charges were "wholly unfounded" and "were not supported by any corroborating evidence." Accordingly, Mr. Dockery sought money damages for wrongful and negligent termination and for negligently causing criminal charges to be filed against him without probable cause.

What transpired in front of the Claims Commission after Mr. Dockery filed his claim is not entirely clear. While the record contains a Tenn. R. Civ. P. 12.02(1) motion to dismiss filed by the Department on March 4, 2005, the papers filed by the parties and the orders filed by the Claims Commission suggest that other procedural developments may have occurred.<sup>1</sup> While there is no dispute that the Claims Commission, at some point, dismissed Mr. Dockery's claim, the date of this dismissal is unclear. A copy of the order has, for some reason, not been included in the record. Mr. Dockery asserts that the order was filed on March 8, 2005. The Claims Commission states that it was entered on April 1, 2005. An order entered by this court states that the order was entered on March 28, 2005.<sup>2</sup>

What is certain in this matter is that at some point, Mr. Dockery instructed his lawyer to perfect an appeal from the Claims Commission's dismissal of his claim. On March 25, 2005, Mr.

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<sup>1</sup>For example, the Claims Commission's December 6, 2005 order states that it granted the Department's Tenn. R. Civ. P. 41.02(2) motion, even though the record contains no indication that any such motion was filed. For his part, Mr. Dockery asserts that the Claims Commission dismissed the claim "on its merits." Of course a Tenn. R. Civ. P. 41.01(2) motion is not appropriate until the plaintiff has completed the presentation of its evidence. This record contains no indication that the Claims Commission ever conducted a hearing on the substance of Mr. Dockery's claim.

<sup>2</sup>*Dockery v. State Dep't of Children's Servs.*, No. M2005-01261-COA-R3-CV (Tenn. Ct. App. Order filed July 22, 2005).

Dockery's lawyer filed a properly completed notice of appeal with the clerk of the appellate court, rather than with the clerk of the Claims Commission.<sup>3</sup> Mr. Dockery's lawyer eventually realized that he had filed the notice of appeal in the wrong place and, on May 18, 2005, filed a notice of appeal with the clerk of the Claims Commission.

On July 22, 2005, this court, on its own motion, dismissed Mr. Dockery's appeal because he had failed to file a notice of appeal with the clerk of the Claims Commission within thirty days after the entry of the order dismissing his claim.<sup>4</sup> Thereafter, Mr. Dockery filed a Tenn. R. Civ. P. 60.02(1) motion with the Claims Commission requesting the Claims Commission to vacate and re-enter the order dismissing his claim to enable him to file a timely notice of appeal with the clerk of the Claims Commission. The Claims Commission denied this motion on December 6, 2005, and Mr. Dockery's lawyer filed a timely notice of appeal with the clerk of the Claims Commission.

## II.

Appellate courts defer to a trial court's decision to grant or deny relief under Tenn. R. Civ. P. 60.02. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003). Accordingly, we review these decisions using an abuse of discretion standard. *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Beason v. Beason*, 120 S.W.3d 833, 839 (Tenn. Ct. App. 2003). When using this standard, a reviewing court will uphold a trial court's ruling as long as reasonable minds could disagree about its correctness, *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Beason v. Beason*, 120 S.W.3d at 839, and will set the ruling aside only when the trial court has applied an incorrect legal standard or has reached a decision which is against logic and reasoning that causes an injustice to the moving party. *Henry v. Goins*, 104 S.W.3d at 479; *State ex rel. Russell v. West*, 115 S.W.3d 886, 889-90 (Tenn. Ct. App. 2003).

Tenn. R. Civ. P. 60.02 provides an exceptional remedy that enables parties to obtain relief from a final judgment. *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn. 1992); *Hungerford v. State*, 149 S.W.3d 72, 76 (Tenn. Ct. App. 2003). The rule strikes a balance between the competing principles of finality and justice, *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991); *Rogers v. Estate of Russell*, 50 S.W.3d 441, 444 (Tenn. Ct. App. 2001), and provides "an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Thompson v. Firemen's Fund Ins. Co.*, 798

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<sup>3</sup> Appeals from the Claims Commission's final orders are appealed to this court in accordance with the Tennessee Rules of Appellate Procedure. Tenn. Code Ann. § 9-8-403(a)(1) (2006 Supp.). Accordingly, pursuant to Tenn. R. App. P. 4(a), Mr. Dockery's notice of appeal should have been filed with the clerk of the Claims Commission within thirty days after the entry of the order dismissing Mr. Dockery's claim.

<sup>4</sup> *Dockery v. State Dep't of Children's Servs.*, No. M2005-01261-COA-R3-CV (Tenn. Ct. App. Order filed July 22, 2005). This order noted that fifty-one days had passed between the March 28, 2005 order dismissing Mr. Dockery's claim and his May 18, 2005 filing of a Notice of Appeal with the clerk of the Claims Commission. Regardless of whether the order dismissing Mr. Dockery's claim was entered on March 8, as Mr. Dockery claims, on April 1, as the Claims Commission claims, or on March 28, per the order of this court, it is undisputed that more than thirty days elapsed between the adverse judgment and the filing of Mr. Dockery's notice of appeal with the clerk of the Claims Commission.

S.W.2d 235, 238 (Tenn. 1990). The burden of proof is on the party seeking Tenn. R. Civ. P. 60.02 relief. The bar for obtaining relief is set very high, and the burden borne by the moving party is heavy. *Johnson v. Johnson*, 37 S.W.3d 892, 895 (Tenn. 2001).

The mistake, inadvertence, surprise and excusable neglect provision of Rule 60.02(1) provides a subjective standard for determining when a party's actions are sufficiently blameless to warrant relief from a judgment or order. *Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn. 1978). The determination of whether to grant this extraordinary relief is fact-intensive, and it requires the trial court to examine the circumstances surrounding the miscue that resulted in the request for relief. *Travis v. City of Murfreesboro*, 686 S.W.2d 68, 70 (Tenn. 1985). Therefore, as a prerequisite to the extraordinary relief under Tenn. R. Civ. P. 60.02(1), a party must present properly supported facts explaining why he or she was justified in failing to avoid mistake, inadvertence, surprise or neglect. *Travis v. City of Murfreesboro*, 686 S.W.2d at 70; *Hopkins v. Hopkins*, 572 S.W.2d at 640; *Turner v. Turner*, 776 S.W.2d 88, 92 (Tenn. Ct. App. 1988). The trial court's examination is incomplete until it has looked at both the type of the order or judgment from which the party is seeking relief and the actions of the persons involved in the miscue.

Of great importance in the examination of the merits of a Tenn. R. Civ. P. 60.02 petition is the nature of the underlying order or judgment. For example, courts construe requests for relief pursuant to Tenn. R. Civ. P. 60.02 much more liberally in cases involving default judgments and dismissals than in cases following a trial on the merits. *Tennessee Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985). This is in keeping with the age-old judicial preference for deciding cases on their merits. *Henry v. Goins*, 104 S.W.3d at 481.

After its examination of the procedural circumstances surrounding the Tenn. R. Civ. P. 60.02 petition, the court must look at the behavior of the party seeking relief. Although matters outside a party's control will almost always be excusable, *Pioneer Inv. Servs. Co. v Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 387-88, 113 S. Ct. 1489, 1494-95 (1993), when a party or its attorney is at fault, close scrutiny is in order to determine whether the action – or inaction – constitutes excusable neglect. See *Williams v. Baptist Memorial Hosp.*, 193 S.W.3d 545, 550-551 (Tenn. 2006); *State ex rel Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001). Accordingly, courts have found that a party whose lawyer was simply too busy to file a timely notice of appeal will not find shelter under Tenn. R. Civ. P. 60.02(1). *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d 181, 186-87 (Tenn. Ct. App. 1985). Similarly, a lawyer's ignorance of the rules or mistaken interpretation thereof is not sufficient reason to qualify for Tenn. R. Civ. P. 60.02(1) relief. *Holiday v. Shoney's South, Inc.*, 42 S.W.3d 90, 93-94 (Tenn. Ct. App. 2000); *Dewees v. Sweeney*, 947 S.W.2d 861, 864 (Tenn. Ct. App. 1996); *Kilby v. Sivley*, 745 S.W.2d 284, 287 (Tenn. Ct. App. 1987).

### III.

Mr. Dockery's lawyer states that his inability to explain precisely why the notice of appeal was mailed to the wrong clerk should be sufficient reason in and of itself to trigger the protections afforded by Tenn. R. Civ. P. 60.02(1). The Department, for its part, argues that a party can never receive Tenn. R. Civ. P. 60.02(1) relief unless the grounds for relief occurred at or before the entry

of judgment and resulted in the entry of the adverse judgment. We have concluded that a movant seeking Tenn. R. Civ. P. 60.02(1) relief must offer some reasonable explanation for the events that led to the request and that, considering the failure of Mr. Dockery's lawyer to do so, the Claims Commission did not err by refusing to grant relief.

#### A.

We begin by addressing the Department's interpretation of Tenn. R. Civ. P. 60.02 relief. Pointing to *Henry v. Goins*, the Department argues that Tenn. R. Civ. P. 60.02 relief may be granted only when the moving party's misstep led directly to the adverse order from which the party seeks relief. We find this to be too strict a construction of the rule. In fact, the Tennessee Supreme Court's exact words are, "[G]enerally speaking, the grounds for relief asserted under Rule 60.02(1) must have occurred at or before the entry of the final judgment and must have resulted in the judgment's entry." *Henry v. Goins*, 104 S.W.3d at 480. This qualified language hardly constitutes the establishment of an iron-clad rule.

As this court explained in *Bowers v. Gutterguard of Tenn., Inc.*, No. M2002-02877-COA-R3-CV, 2003 WL 22994302, at \*5-7 (Tenn. Ct. App. Dec. 17, 2003) (No Tenn. R. App. P. 11 application filed), *Henry v. Goins* established the standards the courts must apply when construing Tenn. R. Civ. P. 60.02 requests concerning orders that are akin to default judgments. This is not a default judgment situation. Regarding the applicability of Tenn. R. Civ. P. 60.02 requests for relief in situations where an appeal was not timely filed, this court addressed the issue twenty-two years ago and determined that Tenn. R. Civ. P. 60.02 is a proper avenue for relief in such circumstances. *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d at 184. In response to questioning, the Department was unable to present a reason why *Jefferson v. Pneumo Servs. Corp.* is not the controlling case on this issue.

#### B.

Having established that Mr. Dockery is entitled to request Tenn. R. Civ. P. 60.02 relief, we turn to the merits of his petition. In Tennessee jurisprudence, the timely filing of a notice of appeal approaches sacrosanctity. In civil cases it is, at the very least, mandatory and jurisdictional. *Albert v. Frye*, 145 S.W.3d 526, 528 (Tenn. 2004); *John Barb, Inc. v. Underwriters at Lloyds of London*, 653 S.W.2d 422, 424 (Tenn. Ct. App. 1983). This court can neither waive nor extend the time period, Tenn. R. App. P. 2; *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d at 184. Indeed, the failure to file a timely notice is the only procedural omission that will affect the viability of an appeal. Tenn. R. App. P. 3(e). An appeal in a civil case cannot be pursued successfully unless it rests on the foundation of a timely and properly filed notice of appeal.

It is in light of this fatal procedural defect that Mr. Dockery's request for relief must be examined. In such a situation, "only the most extraordinary circumstances" will provide grounds for relief. *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d at 184. Mr. Dockery has not met his burden. Mr. Dockery's lawyer candidly conceded in his affidavit that (1) he had participated as an attorney in many appeals, (2) that he considered himself thoroughly familiar with the requirements

of the Tennessee Rules of Appellate Procedure, and (3) that he was not too busy to prepare and file Mr. Dockery's notice of appeal. Along with these concessions, he stated he had "no explanation as to why [he] forwarded the Notice to the Court of Appeals rather than to [the Claims Commission]." This explanation, or lack thereof, falls far short of the requirement of showing facts explaining why a party was justified in failing to avoid mistake, inadvertence, surprise or neglect.<sup>5</sup> At the least, we cannot say the Claims Commission acted outside its discretion in refusing to find that the affidavit submitted by Mr. Dockery's lawyer established excusable neglect.

The courts have good cause to require a reason for granting extraordinary relief under Tenn. R. Civ. P. 60.02(1). If excusable neglect could be demonstrated by nothing more than a shrug of the shoulders, then "I don't know" would form the basis of every Tenn. R. Civ. P. 60.02(1) petition, and the courts would have no means of determining which situations were excusable and which were not. Because the oversight of Mr. Dockery's lawyer occurred after a decision based on the merits of the case, because it resulted in an almost incurable procedural defect, and because Mr. Dockery's lawyer was unable to provide the Claims Commission with a reason why his oversight should be considered excusable neglect, we cannot say that the Claims Commission erred by refusing to grant Mr. Dockery's request for Tenn. R. Civ. P. 60.02(1) relief.

#### IV.

We affirm the Claims Commission's December 6, 2005 order denying Mr. Dockery's motion for Tenn. R. Civ. P. 60.02(1) relief from the order dismissing his claim, and we remand the case to the Claims Commission for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal to Kahn Dockery and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

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<sup>5</sup> During oral argument, Mr. Dockery's lawyer's account of the events was slightly different. He stated that he had prepared the notice of appeal for his secretary and instructed her to send it to the clerk of the Claims Commission. According to Mr. Dockery's attorney, his secretary misunderstood his directions and mailed the notice to the wrong clerk. Our examination of this case is, of course, limited to a review of the record established before the Claims Commission. Therefore, we did not consider the second version of events presented by Mr. Dockery's lawyer during the oral argument.